

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL 74-1065

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff,

against

GENERAL DOUGLAS MACARTHUR SR. VILLAGE, INC., STATE
OF NEW YORK, COUNTY OF NASSAU, VILLAGE OF HEMP-
STEAD, TOWN OF HEMPSTEAD, SCHOOL DISTRICT NO. 1,
SADIE SCHWARTZ, D.C.R. HOLDING CORP., HENRIETTA RAND,
MARTHA BARKUS and SHIRLEY HERSHKOWITZ,

Defendants,

D.C.R. HOLDING CORP., HENRIETTA RAND, MARTHA BARKUS
and SHIRLEY HERSHKOWITZ, SADIE SCHWARTZ,

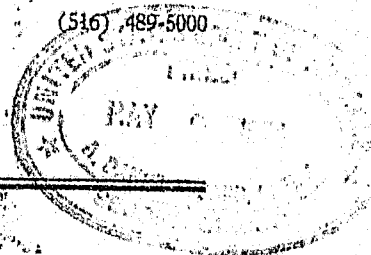
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF ON BEHALF OF DEFENDANT-APPELLEE,
TOWN OF HEMPSTEAD**

JOHN F. O'SHAUGHNESSY,
Town Attorney of the Town of Hempstead,
Hempstead Town Hall,
Town Hall Plaza,
Main Street,
Hempstead, New York 11550.

DANIEL P. MCCARTHY,
Assistant Town Attorney,
of Counsel.



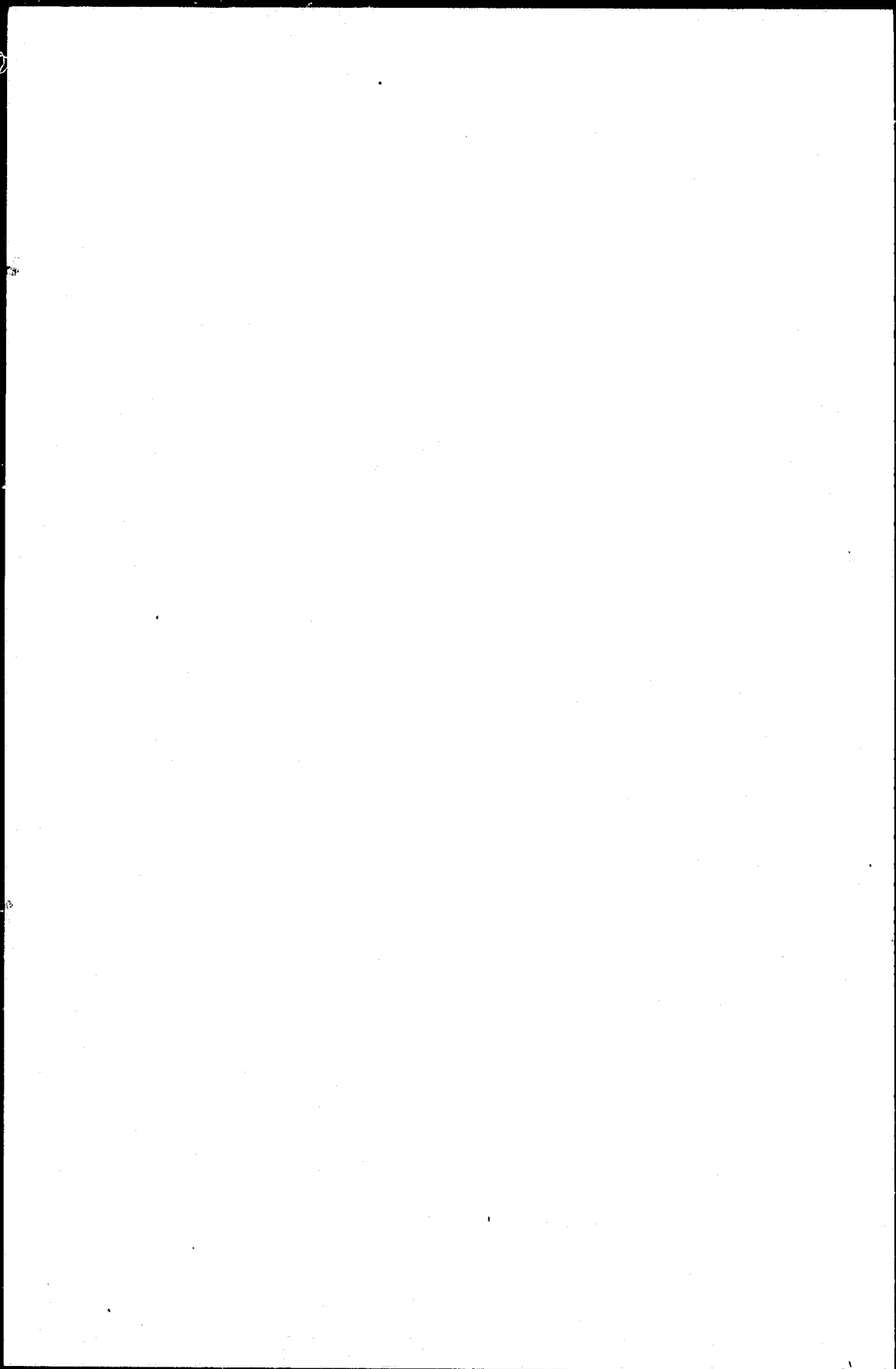


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STEAD, SCHOL DISTRICT No. 1, SADIE SCHWARTZ, D.C.R.
HOLDING CORP., HENRIETTA RAND, MARTHA BARKUS and
SHIRLEY HERSHKOWITZ,

Defendants,

D.C.R. HOLDING CORP., HENRIETTA RAND, MARTHA BARKUS
and SHIRLEY HERSHKOWITZ, SADIE SCHWARTZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANT-APPELLEE, TOWN OF HEMPSTEAD

Statement of the Case

This is an action commenced by the plaintiff to foreclose upon a mortgage covering real property located in Nassau County, New York, made by defendant General Douglas MacArthur Sr. Village, Inc. (hereinafter referred to as "MacArthur"), as mortgagor. The mortgage, together with a regulatory agreement, was recorded in the Office of

the Clerk of the County of Nassau on May 9, 1966. Subsequent to the completion of the Senior Village facility, MacArthur failed to pay the municipal real estate taxes for the years 1969 and 1970. Defendants-Appellants herein purchased tax lien certificates from the municipal taxing authorities for unpaid taxes levied against the property owned by MacArthur. The mortgage of the plaintiff has been held to be superior to the local taxes imposed by the municipalities against the MacArthur real property.

This court has remanded for consideration the cross-claims of Sadie Schwartz and D.C.R. Holding Corp. The municipalities then moved for summary judgment dismissing the cross-claims. The motion was granted by District Judge Jack B. Weinstein, who held that the cross-claimants, in purchasing their tax liens, did so with forewarning of the United States' mortgage, which was a matter of public record. Under these circumstances, the cross-claimants could not prevail.

The cross-claimants now appeal from the final judgment entered in favor of the County, Town, Village and School District.

Question Presented

Whether the cross-claimants are entitled to a refund of the monies paid to municipal taxing authorities for tax lien certificates now rendered worthless because of the priority of a previously recorded Federal mortgage.

The District Court answered this question in the negative.

POINT I

The subject property was validly assessed by the municipal taxing authorities—subject premises not being immune to taxation by reason of the Federal mortgage.

The United States, in instituting this mortgage foreclosure action, based its claim upon the fact that the mortgage required that the mortgagor pay all taxes assessed against the mortgaged property. MacArthur's answer to the complaint admitted the default, and summary judgment against MacArthur was granted on October 15, 1971. MacArthur is no longer involved in these proceedings.

The municipal taxing authorities clearly have the power to tax the MacArthur property. In *United States v. General Douglas MacArthur Sr. Village, Inc.*, 470 F. 2d 675, 680 (2d Cir. 1972) Cert. Den. Sub. Nom., *County of Nassau, et al. v. United States*, 412 U.S. 922 (1973), the Court stated at page 679:

“ . . . At least since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), property of the United States has been immune from taxation by the states or their subdivisions, in the absence of Congressional consent. Of course, in the case at hand, the United States does not own the property, but has only a mortgage interest. Although in such a case local governments may assess taxes based on the full value of the property, see *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 66 S. Ct. 749, 90 L. Ed. 851 (1946), *New Brunswick v. United States*, 276 U.S. 547, 48 S. Ct. 371, 72 L. Ed. 693 (1928), taught that local governments cannot take any action to collect

unpaid taxes assessed against property which would have the effect of reducing or destroying the value of a federally held purchase-money mortgage lien. Accord, *S.R.A., Inc. v. Minnesota*, supra; *United States v. Roessling*, 280 F. 2d 933 (5th Cir. 1960). In short, the land is not immune from local taxation, but the federal interest is, and the local governments cannot enforce their liens until the federal debt is satisfied."

It is, then, well settled and the law of this case that the municipal property taxes levied against the subject property are valid as well as the priority and validity of the first mortgage lien of the United States.

The purchaser of a tax lien certificate takes subject to all claims for taxes or other liens and encumbrances and to any right, title or interest of record of the issuing municipality. A reservation of priority rights of the sovereign is inserted in the County certificate of sale of tax lien. However, even without such an express statement the reservation as to superior liens of sovereignties is implied under New York law. *Riverhead Estates Civic Assoc. v. Gabron*, 206 Misc. 405, 134 N.Y.S. 2d 13; cf. *Hanna v. Babylon Holding Corp.*, 28 N.Y. 2d 89, 320 N.Y. 2d 25.

The reservation of priority makes it abundantly clear that the purchaser takes subject to any other liens and encumbrances upon the property. The purchaser of the tax lien is purchasing the collection rights of the issuing municipality and thus, can obtain no better rights than the municipality in the enforcement of its own lien. Furthermore, the cross-claimants were on constructive notice of the prior Federal mortgage lien and were charged with knowledge of their subordinate lien status.

POINT II

Cross-claimants are not entitled to a refund of monies paid for tax lien certificates in the absence of statutory authority.

In the absence of statute, the rule of caveat emptor applies to the purchaser at a tax sale. Liability for refund of the amount paid by the purchaser of property at a tax sale, where title fails or the property is exempt from taxation, does not exist at common law, and therefore, is purely statutory. McQuillin, Municipal Corporations (3rd Ed. 1972 Revised Volume 16) Sec. 44.172 page 473.

Cited in support of the cross-claimants position are Section 1464 of the Real Property Tax Law and Section 5-68.0 of the Nassau County Administrative Code. However, these sections concern themselves with warranties as to proper assessment, levying of tax and proceedings for the collection of tax—issues of validity, not priority. For example, Section 5-68.0 of the Nassau County Administrative Code reads, in part, as follows:

§5-68.0 Reimbursement for invalid or irregular certificates of sale. a. When any holder of tax liens shall be unable to recover or retain possession of any real estate affected by the tax lien, by reason of any irregularity or error in:

- “1. The assessment of real property;
- “2. The levying of any tax thereof; or
- “3. The proceedings for the collection of any tax, the county treasurer, with approval of the county comptroller, shall reimburse such holder . . .”

As previously noted (*United States v. General Douglas MacArthur Sr. Village, Inc., Supra*), there was no invalidation or irregularity concerning the assessment or the levy of the tax. These statutory provisions were adopted to avoid disputes about validity and to enhance the marketability of title to lands obtained through tax sales, but not to guaranty a profit to the purchaser. (*Blatnicky v. Ciancimino*, 1 App. Div. 2d. 383, 151 N.Y.S. 2d 267).

Only when the statutory warranty of validity of the lien has been breached is the New York municipality obligated to return the taxes paid by the lien purchaser. See *In re Estate of Wadham*, 249 App. Div. 271, 293 N.Y.S. 102 (tax erroneous and void); *Matter of Niagara County Treasurer*, 52 N.Y. State Dep't Rep. 475 (illegal assessment).

Nor may claimants find any comfort in the common law. The law traditionally placed all risks upon the tax purchaser. At common law, he buys under the rule caveat emptor.

" . . . so far as the money paid for taxes is concerned, it is familiar law that a purchaser of a tax title takes all the chances. There is no warranty on the part of the State." *Hussman v. Durham*, 165 U.S. 144, 150 (1897).

"The Tax Sale Certificate," according to the Nassau County Attorney, "is held by the purchaser subject to the Rule of Caveat Emptor." Ops of Nassau Co. Attorney No. 1382 at 7794 (1940). In the absence of statutory provisions, the purchaser has no remedy for refund against the taxing authorities. *State v. Casteel*, 110 Ind. 174, 11 N.E. 219 (1887); *Harding v. Auditor-General*, 136 Mich. 358, 99 N.W. 275 (1904); *Norris v. Burt County*, 56 Neb. 295, 76 N.W. 551 (1898).

POINT III

Monies expended for the purchase of tax sale certificates made voluntarily and with a full knowledge of the facts may not be refunded by the taxing municipalities.

Although it has been declared that illegally assessed taxes may be recovered whether paid by compulsory process or not, it is firmly established that in the absence of statute, a tax paid by mistake may not be refunded where payment thereof was voluntary. *McQuillin, Municipal Corporations* (3rd Ed. 1972 Revised Volume 16) Sec. 44.180 pages 488 and 489.

It has been held in the State of New York that where payment of tax has been voluntarily made with knowledge of all the facts, there is no right to a refund. *In Matter of Village of Delhi*, 201 N.Y. 408; *McCue v. Monroe County*, 162 N.Y. 235.

To constitute a voluntary payment, it must appear that the money was paid *with knowledge of the facts*. *Lesster v. Mayor of the City of New York*, 33 A.D. 350, 53 N.Y.S. 934; *Aff'd*. 161 N.Y. 628. Prior to the sale of tax lien certificates, the United States mortgage was a matter of public record. Cross-claimants, in purchasing the tax sale certificates, are charged with the knowledge of Federal and State law pertaining to the priority and effect to be given to the governments' mortgages.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

JOHN F. O'SHAUGHNESSY,
Town Attorney of the Town of Hempstead,
Hempstead Town Hall,
Town Hall Plaza,
Main Street,
Hempstead, New York 11550.

DANIEL P. MCCARTHY,
Assistant Town Attorney,
of Counsel.

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United States of America,

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School District No. 1, Sadie Schwartz, D. C. R. Holding Corp.,
Henrietta Rand, Martha Barkus and Shirley Hershkowitz,
Defendants,

D. C. R. Holding Corp., Henrietta Rand, Martha Barkus and
Shirley Hershkowitz, Sadie Schwartz,

Defendants-Appellants.

State of New York,
County of New York,
City of New York-ss.:

Othell L. Williams being duly sworn, deposes and says that he is over the age of 18 years. That on the 9th day of May, 1974, he served two (2) copies of the Brief on Behalf of Defendant-Appellee, Town of Hempstead, on each of the following:

Stanley Beals, Esq.
Attorney for Defendant-Appellant, Sadie Schwartz,
380 North Broadway, Jericho, New York 11753

Schiffmacher, Cullen, Rochford and Farrell, Esqs.
Attorneys for Defendant-Appellant, D. C. R. Holding Corp.
98 Cutter Mill Road, Great Neck, New York 11021

Michael P. Gurlides, Esq.
Attorney for Defendants-Appellants, Henrietta Rand,
Martha Barkus and Shirley Hershkowitz,
194 Old Country Road, Mineola, New York 11501

by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to each of said attorneys as shown above, that being the addresses designated by them for that purpose upon the preceding papers in this action.

Sworn to before me this
9th day of May, 1974.

Othell L. Williams.....

Edith G. Zwerling
EDITH G. ZWERLING
NOTARY PUBLIC, State of New York
No. 319813600
Qualified in New York County
Commission Expires March 30, 1976

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